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No. 98-6

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FALLON PAIUTE-SHOSHONE TRIBE IN SUPPORT OF RESPONDENTS

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January 14, 1999

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INTEREST OF THE *AMICUS CURIAE*[1]

The Fallon Paiute-Shoshone Tribe is a federally recognized Indian tribe. The Fallon Tribe is a party to a case pending before the Court of Appeals for the Ninth Circuit, *Nevada v. Hicks, appeal docketed*, No. 96-17315 (9th Cir. Dec. 20, 1996). In *Nevada v. Hicks*, following exhaustion of tribal remedies, the federal district court for the district of Nevada upheld tribal court jurisdiction on the merits. 944 F. Supp. 1455 (D. Nev. 1996). The underlying claims in *Nevada v. Hicks* arose on Indian trust land within an Indian reservation. 944 F. Supp. at 1458 & 1466 n.21. They were brought by a tribal member against non-Indians under federal statutory law – 42 U.S.C. § 1983 – and under tribal common law. *Id.* at 1459 & 1466-1468.

This Court's decision in the present case will likely impact *Nevada v. Hicks*. The present case involves the exhaustion of tribal remedies doctrine and the closely related issues of tribal court jurisdiction over questions of federal law and tribal law. The Fallon Tribe submits this brief to help guide the Court's decision on the proper scope and application of principles of federal Indian law on these issues.

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[1] Pursuant to Rule 37.3(a), Counsel for Petitioners and Counsel for Respondents consent to the filing of the Brief of *Amicus Curiae*. Their letters are submitted for filing herewith. Pursuant to Rule 37.6, no counsel for a party authored this Brief in whole or in part, and no person or entity, other than *amicus curiae*, monetarily contributed to the Brief.

SUMMARY OF ARGUMENT

As a general rule, tribal courts may hear claims and defenses arising under federal law and those arising under tribal law. This authority is among the sovereign powers of tribes over their lands that this Court, Congress, and the Executive Branch have consistently recognized and protected. Whether Congress has foreclosed tribal authority over specific federal law or tribal law claims is an inquiry to be resolved on a case-by-case basis pursuant to well-established principles of federal Indian law such as the exhaustion of tribal remedies doctrine. Absent clear congressional foreclosure, tribal jurisdiction exists and may be exercised by the separate tribal sovereigns, at least when it is invoked by parties injured on tribal lands.

ARGUMENT

I. UNLESS CONGRESS PROVIDES OTHERWISE, TRIBAL COURTS HAVE AUTHORITY OVER CLAIMS ARISING UNDER FEDERAL LAW

In a long line of cases from *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) to *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 118 S.Ct. 1700 (1998), this Court has established the fundamental principles of federal Indian law: Indian tribes are sovereigns, their sovereignty is inherent, and their sovereignty exists unless and until it has been divested by Congress. "The powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never been extinguished.'* " *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *quoting* Felix S. Cohen,

Handbook of Federal Indian Law 122 (1945 ed.) (emphasis in original).

> [T]he conception of Indian sovereignty that this Court has consistently reaffirmed . . . [is that] Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' They 'are unique aggregations possessing attributes of sovereignty over both their members and their territory.'

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982), *citing United States v. Mazurie*, 419 U.S. 544, 547 (1975).

Most recently, the Court affirmed that "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 1413 (1997), *citing Montana v. United States*, 450 U.S. 544, 557 (1981). It is undisputed that the relevant events in the present case occurred on tribal land. J.A. 87a-88a n.5. Thus, as the United States aptly recognizes, this case presents no claim of territorial limits on tribal sovereignty, Brief for U.S. at 8-9 & 11-13, but rather "falls squarely within the heartland of tribal sovereignty. . . . " *id.* at 12.

When discussing tribal sovereignty, this Court has often endorsed the importance of tribal courts. *E.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (tribal court jurisdiction over non-Indian defendants in the civil area, as opposed to the criminal area, is not inconsistent with overriding national interests); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65

(1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."); *Williams v. Lee*, 358 U.S. 217 (1959) (tribal court jurisdiction over civil claims arising on a reservation and brought by non-Indians against Indians is exclusive).[2]

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[2] Several *amici* in support of Petitioners in the present case broadly assert or imply that tribal courts are biased or incompetent. Such statements ignore this Court's observation more than ten years ago that challenges to tribal court competency contradict "congressional policy," *Iowa Mutual*, 480 U.S. at 19, and the Court's own repeated affirmations of tribal court jurisdiction over both Indians and non-Indians, *e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. at 65-66.

As this Court recognized in *Santa Clara Pueblo*, tribal courts are bound by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, which guarantees, *inter alia*, the due process and equal protection rights of both Indians and non-Indians. 436 U.S. at 60-61. Since *Santa Clara Pueblo*, Congress and the Executive Branch have examined in depth the fairness and competency of tribal courts nationwide. *See* Enforcement of the Indian Civil Rights Act: Hearing before the United States Commission on Civil Rights, 100th Cong., 2d Sess. (1988); the Indian Civil Rights Act: A Report of the United States Commission on Civil Rights (June, 1991). In virtually every session, Congress considers legislation affecting tribal courts. *E.g.*, S. 2747, 100th Cong. (1988) (to provide federal court authority to enforce rights secured by the Indian Civil Rights Act); S. 1752, 102d Cong. (1991) (to provide for the development, enhancement, and recognition of Indian tribal courts); H.R. 1268, 103d Cong. (1993) (to assist the development of tribal judicial systems).

The most recent culmination of this process is the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (1993), wherein Congress, rather than curtailing tribal court jurisdiction, authorized important additional financial and technical resources

Even where some claims could arguably be brought in non-tribal forums, the Court has held that they nevertheless must be brought in tribal courts, at least in the first instance. This may be due to rules of law, *e.g., Williams v. Lee*, 358 U.S. at 223 (tribal jurisdiction over on-reservation claims brought by non-Indians against Indians is exclusive), or rules of comity, *e.g., National Farmers Union*, 471 U.S. at 856-857 (the tribal exhaustion doctrine). These rules are predicated on tribal sovereignty, as the Court has recognized. State and federal court jurisdiction "over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government. . . . " *Iowa Mutual*, 480 U.S. at 15; *accord Santa Clara Pueblo v. Martinez*, 436 U.S. at 59 ("providing a federal forum for issues arising under . . . [federal law] constitutes an interference with tribal autonomy and self-government beyond that created by . . . [substantive federal law applied to tribes]").

The present case, *inter alia*, invites this Court to review whether tribal courts may hear claims arising

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for its effective exercise. Since then, Congress has increasingly recognized the stature and sophistication of tribal courts. *E.g.*, the Violent Crime Control and Law Enforcement Act 1994, Pub. L. 103-322, *codified at* 18 U.S.C. § 2265 (requiring that tribes and states accord full faith and credit to tribal court stalking and domestic violence orders); the Deadbeat Parents Punishment Act of 1998, Pub. L. 105-187, *codified at* 18 U.S.C. §§ 225-228 (making it a federal felony to violate tribal court child support obligation orders). Such comprehensive congressional assistance and recognition foreclose any concern that tribal courts are not up to the tasks that Congress and this Court have secured for them.

under federal law. Brief for Pets. at 35.[3] This question is easily answered in the affirmative because tribal court power to determine various matters of federal law is well-established. *E.g., National Farmers Union*, 471 U.S. at 852-857 (questions of federal common law); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 65 (claims under a federal statute).[4] Congress agrees that tribal courts may interpret and enforce federal statutory rights. *E.g.*, the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1925; the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. The Executive Branch

[3] In the present case, no argument is made that tribal court jurisdiction over the federal law claims is exclusive. Thus, the *Amici* States in support of Petitioners point, Brief at 2, about "an unbalanced playing field" is as inappropriate in the present context as it is in the civil rights context where no argument of exclusivity was made.

[4] The *Amici* States, Brief at 4 & 14, also make a sweeping contention – without any citation – that "tribal courts have inherent authority only to apply tribal law." The States point out that tribes preceded the existence of federal law. *Id.* at 15. But it is commonplace for sovereigns to deal with things subsequent. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (discussing the evolution of public health regulation "[a]s technologies advanced . . . from bedpans to brainscans. . . . "); *accord Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984) ("Repeatedly, as new [copyright] developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary").

This Court clearly recognizes adjudicatory jurisdiction as an element of inherent tribal sovereignty even though "[t]ribal courts in the Anglo-American mold were [historically] virtually unknown." *Iowa Mutual*, 480 U.S. at 17; *accord National Farmers Union*, 471 U.S. at 851. In any event, the proper analysis is whether Congress has taken away tribal power over federal law, not whether tribes have such power, because "the power . . . derives from sovereignty itself." *Merrion*, 455 U.S. at 147.

has stated in this litigation that tribal courts "are presumed competent to adjudicate claims arising under any source of law, including federal law, in the absence of a contrary congressional determination." Brief for U.S. at 22. Many lower federal courts have upheld the power of tribal courts to decide, at least in the first instance, issues of federal law. *E.g., United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (trespass to Indian land issues, 25 U.S.C. § 179); *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991) (civil rights claims); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321 (D. Kan. 1997) (Federal Arbitration Act issues, 9 U.S.C. § 2); *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995) (Employee Retirement Income Security Act claims, 29 U.S.C. §§ 1001-1132); *Middlemist v. Lujan*, 824 F. Supp. 940 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994) (federal Indian law issues).

This "commonly shared presumption of Congress, the Executive Branch, and lower federal courts . . . [regarding tribal power over federal law issues] . . . carries considerable weight." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978); *accord Merrion*, 455 U.S. at 139 ("viewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government"). Indeed, it should be the starting point for the Court's opinion in this case. "[U]nless and until Congress makes clear its intention . . . " to divest tribal jurisdiction, *Santa Clara Pueblo v. Martinez*, 436 U.S. at 72, El Paso's assertion, Brief for Pets. at 35, that Congress has not authorized tribal jurisdiction,

is irrelevant. Tribal power over federal claims derives from the sovereignty of tribes and their status in the federal system and does not depend on a delegation of federal power. *Wheeler*, 435 U.S. at 323; *accord National Farmers Union*, 471 U.S. at 851 (many tribal rights today enjoy the protection of federal law in addition to their origins in tribal sovereignty); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.) ("Indian tribes consistently have been recognized . . . as distinct, independent political communities qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.") (footnotes omitted).[5]

Additionally, as the United States argues, tribal power over federal claims includes the power over federal law defenses as in the present case. "In the absence of a contrary congressional determination, tribal courts, no less than state courts, are presumed competent to decide questions of federal law, including preemption [defenses]." Brief for U.S. at 10 (footnote omitted); *see also Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255, 259 (1897);

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[5] El Paso's point, Brief for Pets. at 2 n.2, echoed by its *amicus* National Mining Association, that, until recently, the Navajo Nation had not "claimed" or exercised its full jurisdiction over civil actions involving non-Indians, is inapposite. Tribes do not lose their sovereign powers through non-use. *Merrion*, 455 U.S. at 148 ("Without regard to its source, sovereign power, even when unexercised, is an enduring presence that . . . will remain intact unless surrendered in unmistakable terms."). This Court in *Merrion* specifically noted that amended tribal laws are relevant to whether an exercise of jurisdiction has been "*effectuate*[d]," not whether jurisdiction exists. *Id.* at n.14 (emphasis in original).

Will v. Calvert Fire Ins. Co., 437 U.S. 655, 660 n.3 & 666 (1978) (plurality opinion) (defenses which would otherwise fall within the exclusive jurisdiction of federal courts may be raised in state court proceedings). To hold otherwise would severely undermine tribal sovereignty, including the tribal exhaustion doctrine, which this Court established, *inter alia*, to "[p]romot[e] . . . tribal self-government and self-determination." *Iowa Mutual*, 480 U.S. at 15.[6]

II. ADDITIONALLY, UNLESS CONGRESS PROVIDES OTHERWISE, TRIBES HAVE THE POWER TO PROVIDE LEGAL REMEDIES UNDER TRIBAL LAW FOR CIVIL WRONGS COMMITTED WITHIN THEIR TERRITORY

This Court recognizes that federal law and tribal law are separate bodies of law. In *Wheeler*, the Court refused to find that the federal constitutional double jeopardy clause barred federal prosecution of an Indian following a tribal prosecution. 435 U.S. at 329-330. The sovereigns were separate and so, therefore, was the source of their power to prosecute. *Id.* at 330. Equally, then, federal law and tribal law are distinct and independent sources of

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[6] To ensure uniformity, the right to federal court review of tribal court interpretations of federal law is appropriate. *See National Farmers Union*, 471 U.S. at 856 (suggesting that, in addition to federal court review of tribal jurisdictional determinations, federal courts may review the merits of claims exhausted in tribal court); *see also Iowa Mutual*, 480 U.S. at 19 (such review should be deferential, not a "relitigation" of non-jurisdictional issues "raised . . . and resolved in the Tribal Courts").

law. *See also National Farmers Union*, 471 U.S. at 851 ("federal law defines the outer boundaries of an Indian tribe's power over non-Indians"); *Iowa Mutual*, 480 U.S. at 16 (some challenges to tribal jurisdiction present issues of purely tribal law). The lower federal courts uniformly have followed this distinction. *See, e.g., Basil Cook Enter., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66-68 (2nd Cir. 1997); *City of Timberlake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994); *Romero v. Peterson*, 930 F.2d 1502, 1506 (10th Cir. 1991); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

Thus, unless foreclosed by Congress, in addition to their power to hear claims arising under federal law, tribes "have the power to make their own substantive law . . . and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56, *citing, inter alia, Williams v. Lee*, 358 U.S. 217 (1959). Like the power to prosecute, *Wheeler*, 435 U.S. at 323-330, the power to provide tribal law civil remedies emanates from a tribe's "own retained sovereignty." *Id.* at 324. Indeed, it is an essential part of tribal sovereignty. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations," and in particular, "the authority of the tribal courts over Reservation affairs." *Williams v. Lee*, 358 U.S. at 223; *see also Merrion*, 455 U.S. at 137-138 (governmental services are among "the advantages of a civilized society that are assured by the existence of tribal government."). "[T]he congressional policy promoting the development of tribal courts," *Iowa Mutual*, 480 U.S. at 19, includes the recent and specific reaffirmance that "tribal justice systems are

an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." The Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601(5).

This conclusion is also buttressed by notions of sovereignty outside the area of federal Indian law. A sovereign's authority to adjudicate civil disputes arising within its territory is so integral to the definition of sovereignty that it has become one of "the most firmly established principles of . . . jurisdiction in American tradition." *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (plurality opinion). This is so particularly with respect to torts, an area of common law traditionally addressed through judicial fora. *See* Judge Robert E. Keeton, *Part I: The Changing Lives of Professionals in Law*, 37 Ariz. L.Rev. 419 (1995) ("on the subject matter of tort law, courts come to mind as historically the principal lawmakers, using the common law process"); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) ("A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory."); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954) (states manifest their "natural interest in the injured by providing remedies for recovery of damages").

Acknowledging that tribes may provide tort law generally is consistent with the many cases upholding various exercises of tribal sovereignty by tribal law and regulation. *E.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 438-444 (1989) (plurality opinion) (tribe can zone and regulate land use of non-Indian land); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337-338 (1983) (tribe can regulate hunting

and fishing of non-Indians); *Merrion*, 455 U.S. at 144 (tribe can tax oil and gas severance by non-Indians);[7] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (tribes can tax cigarette purchases by non-members, including non-Indians).

Congress has not generally divested this tribal power, at least where tribal members have been harmed on Indian land. "[U]ntil Congress acts, the tribes retain their existing sovereign powers." *Wheeler*, 435 U.S. at 323; *accord Williams v. Lee*, 358 U.S. at 223 ("If this power is to be taken away from them, it is for Congress to do it."); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion*, 455 U.S. at 149 n.14.[8]

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[7] Significantly, in *Merrion*, the Court held that "the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management." 455 U.S. at 141.

[8] In the present case, the tribal interest in providing legal remedies under tribal law is heightened by El Paso's choosing to enter the reservation and do business there pursuant to leases with a tribe. *See Montana*, 455 U.S. at 565 (even on non-Indian fee lands, "Indian tribes retain inherent sovereign power . . . [to] . . . regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with a tribe or its members through commercial dealing, contracts, leases, or other arrangements."); *see also Colville*, 447 U.S. at 153-154 (tribes retain inherent authority to tax "non-Indians entering the reservation to engage in economic activity.").

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of January, 1999.

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